BOOK REVIEWS.

THE DOCTRINE OF JUDICIAL REVIEW, ITS LEGAL AND HISTORICAL BASIS, AND OTHER ESSAYS. By Edward S. Corwin, of the Department of History and Politics, Princeton University. Princeton; Princeton University Press; London, Humphrey Milford Press, 1914, pp. vii, 177.

This book consists of five essays, the first and principal of which relates to the doctrine of judicial review, concerning which the author has already made distinguished contributions in this and other law reviews. The second, entitled "We, the People", is an argument for the nationalistic theory of our government. The third is a complete destruction of the Pelatiah Webster myth. The fourth is a vigorous argument that Taney's discussion of the Missouri compromise in the *Dred Scott* case was not *obiter dictum,* that it was not based upon Calhounist premises, at least so far as the majority of the court entering into the decisions are concerned, and third that Justice Curtis has not succeeded in refuting Chief Justice Taney's argument upon the question of Dred Scott's title to prima facie citizenship within the recognition of the constitution. The fifth paper, read at the annual meeting of the Lake Mohonk Conference on International Arbitration, 1914, is a brief argument in favor of a wide scope and extent of the treaty-making power of the United States. The author's views upon this matter have been much more elaborately declared in his book entitled "The Treaty-making Power a National Supremacy," reviewed in 13 MICHIGAN LAW REVIEW, 65.

So compact is the argument in Dr. Corwin's work that it is impossible to summarize justly within the compass of the ordinary book review. In his first paper the author examines a number of the recent essays with reference to the right of the courts to review legislation. He does not accept in entirety any of the theories that have been advanced either to deny or affirm that the courts have rightfully exercised this function. The view that the power may be supported wholly upon constitutional provisions and the purely legalistic proposition that the existence of the power is demonstrated in *Marbury* v. *Madison* and succeeding cases the author rejects as obviously insufficient. There will be pretty general agreement with him today thus far. Certainly the constitution itself does not in terms or by implication unsupported by other factors give to the courts of the United States the power to review legislation, at least that of Congress.

As to *Marbury* v. *Madison,* it is undoubtedly a great opinion with some glaring defects. A few years ago it was described as proving the existence of the power in question with mathematical precision and finality. But today no legal scholar accepts this view. It scarcely seems necessary to have picked the case to pieces as Dr. Corwin has done. Several of the propositions advanced by the Chief Justice which Dr. Corwin attacks are certainly established law. It is a familiar fact to any close student of law that courts frequently go apparently by instinct or an intuitional

faculty, developed by experience, to the correct decision of the case and to the right solution of the principal legal problem involved, but announce sometimes very inadequate or even incorrect reasons therefor. *Marbury* v. *Madison* went straight to the mark, but it is altogether probable that the Chief Justice did not accurately describe the processes by which his own mind determined that mark. The true foundation for this peculiar power of the courts in the United States must be found as has been pointed out by Professor A. C. McLaughlin in his "Courts, Constitution and Parties," and by many others, in a complex of the political philosophy of the times, the experience of the Colonists and the people of the states during the Revolutionary period, and of constitutional clauses broad enough to include, though they did not explicitly authorize or even refer to, this right.

Dr. Corwin has led up to this conclusion clearly and admirably. In effect his view does not differ much from Professor McLaughlin's, though he criticizes the latter's suggestion that all three departments of government must pass upon legislation and that experience, convenience and comity have given to the courts the peculiar power to make not only their decision in the particular case final but also their opinion as to the validity of statutory law involved, binding upon the other departments. The reviewer has not understood Professor McLaughlin to mean necessarily what Dr. Corwin seems to think in this respect. Certainly it ought to be accepted by this time that the function of the court in passing upon a statute involved in a case before it differs from that of the executive who is determining whether or not to enforce or apply the law. The latter clearly acts at his peril in making his decision. But the court's determination is binding upon the parties and as a statement of law upon all others, because it is the duty of the court to decide according to law and it is necessarily given authority to do this. It must follow that the court's decision is law. Dr. Corwin has neatly punctured a good deal of the wordy discussion as to whether the result of an adverse decision by the court is to render the statute void, voidable or unenforceable. As he says, "The constitution endows the Legislature with the power to make laws in harmony with it, which means. however, not merely the power of putting projects of legislation through the proper parliamentary stages but *also that of vesting them with the force and sanction of law.*" See pp. 24-25.

Some valuable notes in the nature of appendices are added to this paper. Altogether it is one of the most stimulating and valuable contributions we have had to this interesting subject.

The substance of the essay on the *Dred Scott* decision was read as a paper before the American Historical Association in 1910, and has been much discussed. Dr. Corwin has examined this case with an attitude wholly independent of the conventional views. Despite the ability with which he presents his case it is not likely that lawyers generally will accept his views that Taney's opinion as to the Missouri Compromise is not, as has been generally considered, *obiter dictum.* It is quite true, as Dr. Corwin says (p. 136) that if a decision is based upon more than one ground the

auxiliary part does not necessarily become *obiter dictum*. The definitions of *dictum* taken by Dr. Corwin from a law encyclopedia are not quite adequate. Moreover it certainly has been the theory of the courts and of such writers on constitutional law as Judge Cooley and Professor J. B. Thayer that when questions of constitutional law are involved the court should decide only what is absolutely necessary to reach a judgment in the case. It is quite true as Dr. Corwin says (p. 137 et seq.) judges have frequently said and perhaps tried to decide a great deal more than was necessary under this theory. Striking recent examples may be found in some of the Insular cases and in the Standard Oil and American Tobacco Company cases in which the rule of reason was announced. This is done because the courts deem it important to put at rest if possible important constitutional questions by giving their matured views about them. This nevertheless does not justify the practice, and on the whole it seems to the reviewer that more harm than good has been done in this way. Thus the rule above referred to is justified. In this view of the case, as there were two possible theories as to the interpretation of the Missouri Compromise under one of which the statute was valid and under the other invalid, it was the duty of the court to apply that under which the statute could be upheld, and necessarily the other view was *obiter dictum*. That courts have not always adhered to the true rule does not alter the case. Part three of this essay is particularly valuable but space will not permit an analysis of its argument.

One is inclined to think that Dr. Corwin overemphasizes the importance of what may be called verbal criticisms of court decisions. It is of course extremely easy to show inconsistencies between opinions even of the same court by comparing excerpts and sometimes even decisions from different cases. But this does not necessarily get us very far. In the nature of things courts cannot have before them in any one case all that has been decided or said upon the point in controversy. They can only seek to reach a just conclusion upon the facts of that case, guided by general principles already announced. That they frequently give wrong, inconsistent and inadequate reasons must be freely admitted. Nevertheless these errors do not deflect them from the true course of justice or even of legal theory as much as might be expected. Dr. Corwin shows truly amazing skill in pointing out the kind of inconsistencies referred to. But the more convincing portions of his work in this book and others are those in which he, taking a somewhat larger view of cases, and bringing to bear upon them his wide historical knowledge, reaches conclusions which evidently are going into the formation of a strong and able presentation of a nationalistic theory of our government and its constitutional law.

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